88-1193

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

SOUTHWESTERN BELL TELEPHONE COMPANY,

Petitioner,

v.

CONTINENTAL CASUALTY COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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January 16, 1989

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QUESTIONS PRESENTED

1. Whether, under the Seventh Amendment, a Federal Appellate Court may reverse a jury damage award, previously upheld by the trial court on motion for new trial, absent a finding, in accordance with the standard previously used in all eleven circuits, that the award is so inadequate as to shock the conscience of the Court or to raise an irresistible inference of passion or prejudice.

2. Whether, under the Seventh Amendment, a Federal Appellate Court's grant of a new trial limited to damages only is proper where surrounding circumstances suggest a compromise verdict in the absence of a finding, after consideration, that liability and damages are clearly separate.

RULE 28.1 LISTING

Southwestern Bell Corporation

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In The

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SOUTHWESTERN BELL TELEPHONE COMPANY,

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CONTINENTAL CASUALTY COMPANY,

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Southwestern Bell Telephone Co., defendant below, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Tenth Circuit (District Judge Saffels, with Circuit Judges Seymour and McWilliams), which reversed a judgment for plaintiff based on a jury verdict and remanded for a new trial limited to damages only.

OPINIONS BELOW

The opinion delivered in the Court of Appeals is reported at 860 F.2d 970 (10th Cir. 1988).

JURISDICTION

The judgment of the Court of Appeals was dated and entered May 31, 1988. Petitioner's timely petition for rehearing and suggestion for rehearing en banc was denied by the Court of Appeals on October 18, 1988. The jurisdiction of this Court to review the judgment of the Court of Appeals by writ of certiorari is conferred by 28 U.S.C. §§ 1254(1), 2101(c).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

United States Constitution, Amendment VII; Fed.R.Civ.P. 38 and 59.

STATEMENT OF THE CASE

This is an action for damages alleged to have resulted from libel and interference with contract. The damages sought under both theories were the revenues allegedly lost as a result of the cancellation of numerous insurance contracts between plaintiff and nonparties. The case was commenced on May 17, 1983; jurisdiction was based on diversity of citizenship. The case was tried to a jury beginning September 19, 1985, and resulted in a verdict

for plaintiff on its interference with contract claim in the amount of $21,423.00. The jury returned a verdict for defendant on the libel claim. Plaintiff's motion for new trial was overruled, and the appeal which gives rise to this petition followed. This Petition involves questions concerning the authority of the Court of Appeals to set aside the damage award as contrary to the manifest weight of the evidence.

A. The Trial Court Proceedings.

Plaintiff's interference claim was based on a decision of defendant to cease acceptance of bids from contractors who were insured by plaintiff. In the course of its business, defendant routinely employed independent contractors to lay underground cable. To bid for the cable laying business, the contractors were obligated to demonstrate that they had certain insurance in force, including general liability and worker's compensation. The contractors themselves were the insureds under those policies. In addition, the contractors were required to furnish an Owners and Contractors Protective policy (OCP) which protected Bell from claims resulting from actions by the contractors. Bell was the named insured on the OCP policies. Tr. 802.

In the Spring of 1983, Bell became dissatisfied with the claims handling performance of plaintiff and decided to cease accepting CNA as the carrier on OCP policies. Tr. 909. That decision was formally communicated to contractors in a March, 1983 letter. Complaint Ex. "B". Bell announced that it had changed its policy on contractor's insurance requirements and would therefore no longer

accept bids from contractors who were insured by CNA. About a month later, Bell became aware that the letter could be read as applying to policies other than OCP and sent a followup making clear that its policy change applied only to OCP policies. Plaintiff's Ex. 37, Tr. 921.

CNA asserted that the Bell policy change amounted to interference by Bell with 467 separate contracts of insurance that were canceled within one year after the Bell letters. Plaintiff's Ex. 53. The policies with which interference was charged included auto, life, general liability and worker's compensation in addition to the OCP policies to which the letters were addressed.

At trial, the evidence was disputed as to the justification for Bell's action, its effect on CNA, and whether the cancellations were caused by factors other than the Bell actions. Tr. 452, Defendant's Ex. 13, 14, 16, 17.

Despite the fact that plaintiff's interference claim covered alleged cancellation of hundreds of separate insurance contracts and the fact that alternative evidence of the reason for those cancellations was introduced, the case was submitted on a general verdict. Doc. No. 313, verdict 9/30/85. The jury was asked to decide whether defendant had interfered with plaintiff's contracts, and, if it so decided, to assess damages. Neither party objected to the form of verdict. The jury was not required to identify, or to specify the number of, the insurance contracts with which it found defendant had interfered. Indeed, the jury was instructed that it had no obligation to explain how it calculated any damage award. Thus,

there is no way to tell from the jury verdict which insurance policies, or how many insurance policies, were included in the jury's finding of interference.

Plaintiff filed a motion for new trial in which it challenged the amount of damages awarded. The only ground expressly raised was that the award was inadequate on its face. The trial court denied the motion.

B. The Court of Appeals Decision.

Among other issues, plaintiff appealed the trial court's denial of motion for new trial based on the low damage award. Plaintiff combined two theories to attack the award: 1) The verdict was facially inadequate. 2) The trial judge abused his discretion in denying new trial because the verdict was against the weight of the evidence.

The court found that the damage award was not so inadequate as to raise a presumption of passion or prejudice and require new trial and was, therefore, not inadequate on its face. (860 F.2d at 973.) The court then weighed the evidence and reversed the trial judge on the ground that the verdict was against the weight of the evidence. (860 F.2d at 973.)

The court ordered a new trial limited to the damage issue alone even though the jury had rendered a general verdict after considering liability and damages with respect to 467 insurance policies. The Opinion gives no indication that the Court considered whether the damage issue was clearly separable from the liability issue, or whether the verdict was a result of jury compromise.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS DISREGARDED ESTABLISHED LIMITATIONS ON ITS POWER TO REVIEW JURY DAMAGE AWARDS.

This Court has expressly reserved the question whether the Courts of Appeals have any power under the Seventh Amendment to review the amount of damages awarded by jury verdict and upheld by the trial judge on motion for new trial. *Fairmont Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 485, 53 S.Ct. 252, 77 L.Ed. 439, 446 (1933); *Neese v. Southern Railroad Co.*, 350 U.S. 77, 77, 76 S.Ct. 131, 100 L.Ed. 60, 61 (1955). Nonetheless, all eleven Circuits have found that such power exists under narrowly limited circumstances.

While the precise language used to describe that limited review varies, the consistent holding has been that damage awards will only be disturbed if the award is "monstrous", "shocks the conscience of the Court", or raises an irresistible inference of "passion, prejudice or improper influence". (*See*, cases cited *infra* at p. 7).

Yet, the decision by Judge Saffels below reverses the jury's damage award despite an express finding that this narrow scope of review cannot be satisfied in this case.

> "The damage figure awarded by the jury is not so inadequate as to raise an inference of passion or prejudice, and CNA has offered no evidence to support such a finding. Under the standard in *Black*, the Court cannot find that the award is so inadequate as to require a new trial." *Continental Casualty Co. v. Southwestern Bell Tel. Co.*, 860 F.2d 970, 973 (10th Cir. 1988), referring to *Black v. Hieb's Enter., Inc.*, 805 F.2d 360 (10th Cir. 1986).

A. If Allowed To Stand This Decision Is In Conflict With All Other Circuits And Prior Decisions In The Appellate Court's Own Circuit.

All circuits apply essentially the same test to appellate review of the amount of damages awarded by jury verdict, whether the award is attacked as being too great or too small:

> "Federal District Judges have broad discretion on the question of whether to grant a new trial. The trial judge's decision on this issue will not be disturbed absent a gross abuse of discretion. In reviewing the District Court's use of its discretion regarding inadequate verdict claims, as in excessive verdict claims, we must determine whether the award "shock(s) the judicial conscience and . . . raise(s) an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial . . . "

Grant v. Brandt, 796 F.2d 351, 353 (10th Cir 1986) (citations deleted). *See also Brown v. Freedman Baking Co.*, 810 F.2d 6, 11 (1st Cir. 1987); *Dagnello v. Long Island Railroad Co.*, 289 F.2d 797, 802 (2d Cir. 1961); *Dowd v. Webb*, 337 F.2d 93, 97 (3d Cir. 1964); *Klein v. Sears Roebuck & Co.*, 773 F.2d 1421, 1428 (4th Cir. 1985); *Vidrine v. Kansas City Southern Railway Co.*, 466 F.2d 1217, 1221 (5th Cir. 1972); *Jenkins v. Associated Transport, Inc.*, 330 F.2d 706, 712 (6th Cir. 1964); *Joan W. v. City of Chicago*, 771 F.2d 1020, 1023 (7th Cir. 1985); *Novak v. Gramm*, 469 F.2d 430, 434 (8th Cir. 1972); *Simpson v. Union Oil Co.*, 411 F.2d 897, 908 (9th Cir. 1969); *Bennett v. Longacre*, 774 F.2d 1024, 1028 (10th Cir. 1985); *C. A. May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981).

The court below specifically found that: "The damage figure awarded by the jury is not so inadequate as to

raise an inference of passion or prejudice. . . . The Court cannot find that the award is so inadequate as to require new trial." 860 F.2d at 973. Under prior authority in all eleven circuits, that finding would ordinarily have resulted in affirmance.

Yet, the Court of Appeals, having found that the verdict was not inadequate under the usual formulation, went on to reweigh the evidence on its own. 860 F.2d 970, 973-75.

The court then concluded that "the jury's damage award is clearly, decidedly and overwhelmingly against the weight of the evidence." 860 F.2d at 973. No *de novo* determination of the weight of the evidence is appropriate. *Karns v. Emerson Electric Co.*, 817 F.2d 1452, 1456 (10th Cir. 1987); *Brown v. McGraw-Edison Co.*, 736 F.2d 609, 619 (10th Cir. 1984); *Harris v. Quinones*, 507 F.2d 533, 535 (10th Cir. 1974) (district court's grant or denial of motion for new trial made on ground that verdict is against weight of the evidence will not be reversed absent an "unusual situation" or "gross abuse of discretion"). Appellate inquiry is limited to whether the district court's refusal to set aside the jury's verdict is a manifest abuse of its discretion. Case after case has held that abuse of discretion can only be found where the award is so inadequate or excessive that it is "monstrous", "shocks the conscience of the court", "raises an irresistible inference of passion, prejudice or improper influence", etc. The court cannot first determine that this criteria for abuse of discretion is not met and then go on to reweigh the evidence. *Dowd v. Webb*, 337 F.2d 93, 97 (3d Cir. 1964); *Boston and Maine Railroad v. Talbert*, 360 F.2d 286 (1st Cir. 1966);

J.T. Majors & Son, Inc. v. Lippert Bros., Inc., 263 F.2d 650, 655 (10th Cir. 1958).

The Court of Appeals decision in the instant case expands the scope of review of jury damage awards beyond what all circuits previously had believed the Constitution allows.

This court has never directly addressed the questions presented by this case. Absent action by this Court, the decision below will result in confusion as to the proper role of the Courts of Appeals under the Seventh Amendment.

By its action, the Court of Appeals crossed the line between properly reviewing the trial court's exercise of discretion and improperly reviewing the jury's fact finding. In this case there was evidence to support the award. Testimony was presented that damages were as low as $17,227.00. 860 F.2d at 973.

Until now, the Courts of Appeals have consistently held that constitutional review of a trial judge's disposition of motion for new trial is premised upon a review of the trial court's discretion and not upon a review of the facts themselves. *Simmons v. Avisco Local 713, Textile Workers Union*, 350 F.2d 1012, 1020 (4th Cir. 1965). A reversal of the trial court's decision must be because of an abuse of discretion. Just as a trial judge is not called upon to say whether the amount is higher or lower than he personally would have awarded, so appellate judges are not to decide whether they would have set aside the verdict if they were presiding at the trial, but whether the amount is so high or low that it would be a denial of justice to permit it to stand.

In the case at bar the court below has exceeded the narrow bounds of appellate review. The court of appeals continued past a decision that the criteria for abuse of discretion had not been met and went on to reexamine the facts and the evidence. It thus usurped the jury's role and denied petitioner its Seventh Amendment right to a jury determination of damages.

II. THE GRANT OF A NEW TRIAL LIMITED TO DAMAGES ONLY IS CONSTITUTIONALLY IMPERMISSIBLE WHERE LIABILITY AND DAMAGES ARE NOT CLEARLY SEPARATE OR WHERE CIRCUMSTANCES SUGGEST A COMPROMISE VERDICT

A. The Seventh Amendment Allows A Partial New Trial Only When The Issue To Which The Trial Is Limited Is Clearly Distinct And Separable.

The appellate court did not explain its decision to limit retrial to damages only. As far as the opinion discloses, the court did not consider whether the damage and liability issues could constitutionally be separately tried.

Yet, this Court has expressly held that the power to order a new trial limited to damages alone may be exercised only where the court finds that the damage issue is clearly "distinct and separable."

> "A partial new trial may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500, 51 S.Ct. 513, 75 L.Ed. 1188, 1191 (1931).

Gasoline Products Co., like this case, was a challenge to a damage award returned by general verdict. The *Gasoline Products Co.* jury either did not determine the terms of the contract, or it was impossible to tell from the verdict what terms were interpreted as being the terms of the contract. To set damages for breach of contract, those terms had to be determined. This Court held that a new trial on the issue of liability as well as damages was required because the issues were so interwoven they were not separable. *Gasoline Products Co.*, 283 U.S. at 500.

This case is, if anything, more compelling than *Gasoline Products*. Plaintiff's interference claim was not for a supposed interference with one contract, or even one kind of contract. Rather, plaintiff sought recovery for interference with 467 contracts covering several different kinds of insurance; the relevant facts surrounding each differ. For instance, the jury might have determined that Bell interfered with OCP policies, the type policies Bell's complaints directly involved, but not other types. Indeed, after the initial determination to cease accepting CNA policies, a clarification was published limiting the action to OCP policies. Plaintiff's Exhibit 37. On the other hand, the jury could have concluded just the opposite. It could have believed that Bell's action was justified with regard to OCP policies, but constituted interference as to others. There simply is no way to determine from the record the number or identity of policies with which the jury believed Bell interfered.

Thus, the Order creates insurmountable difficulties for the trial judge on remand. The jury clearly did not

find defendant liable for interference with all 467 insurance policies or it could not have returned the verdict it did.

Neither jury verdict nor the Court of Appeals decision identify which of those 467 insurance policies defendant has been found to have interfered with. The trial judge presumably is expected to instruct the jury on retrial that liability has already been determined as to some of them. Yet, there is no way for him to do so.

B. Where Circumstances Indicate A Compromise Verdict, No New Trial Limited To The Damage Issue Alone Is Permissible.

The Court of Appeals also failed to consider whether the verdict may have been the product of a jury compromise not reflecting a true finding on liability. The court concluded that the damages awarded by the jury and upheld by the Trial Court were below the lowest amount that possibly could be awarded under the evidence. Indeed, the opinion reports an exhaustive discussion of the evidence and concludes that there is no possible rational explanation for the award.

Yet, the panel opinion ordered a new trial limited to damages without even considering the possibility that the amount of the damage award reflected a compromise verdict in which a low damage award was the price exacted by some of the jurors for joining in a liability verdict with which they disagreed. If the verdict was a result of compromise, the liability and damages issues cannot be considered "clearly separate" under *Gasoline Products Co.* and limited retrial is not constitutionally permissible.

The Tenth Circuit itself previously held that consideration of possible compromise is mandatory before a limited new trial may be ordered. This issue was squarely presented in *National Railroad Passenger Corp. v. Koch Industries, Inc.*, 701 F.2d 108 (10th Cir. 1983).

Under the prior decisions of this Court and of the Tenth Circuit, the panel was obligated to consider the possibility that the damage award was the product of jury compromise before it could properly limit retrial to damages only. Assuming that the damage award was inadequate, there was substantial reason to suspect the possibility of juror compromise. Where suspicion of a compromise verdict is aroused, there can be no limited new trial.

CONCLUSION

For these reasons, the Petition for Certiorari should be granted.

January 16, 1989.

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APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CONTINENTAL CASUALTY COMPANY, an Illinois Corporation,	)	
Plaintiff,	)	NO. CIV-83-1131-T
vs.	)	
SOUTHWESTERN BELL TELEPHONE COMPANY, a Missouri corporation,	)	
Defendant.	)	

O R D E R

(Filed January 14, 1986)

Upon consideration of plaintiff's motion for new trial on the issue of an inadequate jury verdict, the Court finds that the compensatory damages awarded by the jury is sustained by the evidence. The Court further finds that no error occurred in allowing defendant's expert witness, Dr. John Fitzgerald, to testify.

Because a reasonable basis exists for the jury's verdict, the compensatory damages award will not be set aside, and plaintiff's motion for new trial is hereby overruled.

IT IS SO ORDERED this 14th day of January, 1986.

/s/ Ralph G. Thompson
UNITED STATES DISTRICT JUDGE

2-APP

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CONTINENTAL CASUALTY COMPANY, an Illinois corporation, Plaintiff-Appellant, v. SOUTHWESTERN BELL TELEPHONE COMPANY, a Missouri Corporation, Defendant-Appellee.	)	No. 86-1281 (Filed May 31, 1988)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (D.C. No. Civ-83-113-T

Michael Minnis of Pierson, Ball & Dowd (David McCullough of Pierson, Ball & Dowd, Oklahoma City, Oklahoma, and David Machanic and Michael Curtis of Pierson, Ball & Dowd, Washington, D.C., with him on the brief), Oklahoma City, Oklahoma, for Plaintiff-Appellant.

Andrew M. Coats of Crowe & Dunlevy (Larry E. Joplin, Wesley C. Fredenburg, and Robert G. McCampbell, with him on the brief), Oklahoma City, Oklahoma, for Defendant-Appellee.

Before SEYMOUR and McWILLIAMS, Circuit Judges, and SAFFELS, District Judge*.

SAFFELS, District Judge.

Plaintiff/appellant Continental Casualty Company (CNA) filed this lawsuit against Southwestern Bell Telephone Company (Southwestern Bell), stating causes of action for libel and tortious interference with contract based on statements published by Southwestern Bell to the effect that CNA denied valid insurance claims on numerous occasions. Immediately prior to trial, the district court held that the statements were not libel per se, and the trial proceeded under a libel per quod theory. The jury subsequently returned a $21,423.00 compensatory damage verdict in CNA's favor on the tortious interference with contract claim, but it found for Southwestern Bell on the libel claim. CNA appeals the adequacy of the damages and alleges various errors by the trial court. For the reasons below, we reverse and remand for a new trial on several issues.

I.

In addition to using its own in-house labor, Southwestern Bell regularly employs independent contractors to place underground cable for new telephone users in the Oklahoma City, Oklahoma area. A prerequisite for receiving a cable-laying contract from Southwestern Bell is the purchase of insurance by the contractor to cover

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*Honorable Dale E. Saffels, United States District Judge for the District of Kansas, sitting by designation.

claims against the contractor or Southwestern Bell arising from the cable-laying operations. Southwestern Bell required all such independent contractors to purchase an Owner's and Contractor's Protective (OCP) policy. In an OCP policy, Southwestern Bell is the insured entity. The independent contractor was also required to purchase a General Liability (GL) policy, naming itself as the insured. Southwestern Bell required that the OCP and GL policies be issued by the same insurance carrier.

CNA was one of the insurance carriers that provided OCP and GL policies to Southwestern Bell's independent contractors. Southwestern Bell representatives testified at trial that from 1981 to 1983, they experienced difficulties in dealing with CNA, particularly in CNA's handling and approval of claims under the policies. In February 1983, Ken Felker, head of Southwestern Bell's claims department, wrote an internal memorandum to Bob White, chief of the plant division, in which he recommended that bids no longer be accepted from independent contractors who were insured with CNA. The memorandum contained the following remarks:

> "Since the Claims Office opened for business in October, 1981, we have handled numerous cases where our outside contractors have damaged our customer's property. As a general rule, the insurance carriers for these contractors have responded promptly and resolved those claims that are legitimate.
>
> One exception to this has been Continental Casualty Company (CNA). On numerous occasions they have denied valid claims, ignored claimants, refused to cooperate with us, etc. We have been exposed to

> potential lawsuits and our reputation as a responsible corporate citizen has been damaged because of CNA's attitude and methods.
>
> For these reasons, we strongly recommend that bids no longer be accepted from contractors who are insured by CNA."

Plaintiff's Exh. 10. White repeated these statements verbatim in a memorandum distributed to various divisions within Southwestern Bell. Plaintiff's Exh. 6. Upon receiving the White memorandum in early March, 1983, the managers of several Southwestern Bell divisions sent letters to cable-laying contractors, informing them that bids would no longer be accepted from contractors who are insured by CNA. Some of these letters incorporated verbatim the language from the Felker and White memorandums. *E.g.*, Plaintiff's Exh. 2.

Upon learning of Southwestern Bell's intent to cease accepting bids from contractors carrying insurance with CNA, many cable-laying companies canceled their CNA policies. Shortly thereafter, CNA filed the present lawsuit for damages arising from Southwestern Bell's allegedly libelous statements and its interference with contractual relations between CNA and its insureds. The jury found for CNA on its contractual interference claim, awarding it $21,423.00 in compensatory damages. The jury returned a verdict in Southwestern Bell's favor on the libel claim. CNA moved for a new trial on the issue of damages, claiming that the verdict was inconsistent with the evidence. CNA expressly reserved the right of appeal on other alleged errors. The district court denied the motion.

On appeal, CNA makes three principal arguments: (1) It is entitled to a new trial because the damage award

was so low that the verdict was, on its face, inconsistent with the evidence; (2) The district court erred in finding that the statements contained in the memorandums and letters were not libel per se and in admitting certain evidence supporting Southwestern Bell's defense of truth; and (3) The district court erred in permitting a Southwestern Bell witness to testify, to qualify as an expert, and to use exhibits that were not listed in the pretrial order. We address these arguments in turn.

II.

CNA's first claim of error relates to the adequacy of the jury verdict on the tortious interference with contract claim. CNA contends that the amount of damages awarded by the jury on this claim was so low that the verdict was, on its face, inconsistent with the evidence at trial. CNA's branch manager, Bob Blessing, testified at trial that as a result of southwestern Bell's damaging statements, CNA lost 467 insurance policies that generated $776,609 in annual premiums. R. Supp. Vol. VI at 419; Plaintiff's Exh. 53. The controller of CNA, Dennis Chookaszian, testified that Southwestern Bell's actions conservatively caused a loss of $1.159 million in profits, reduced to present value and assuming a ten-year renewal limit. R. Supp. Vol. VIII at 711-20; Plaintiff's Exh. 57. Southwestern Bell's own expert, John Fitzgerald, testified that, assuming liability, total damages should be a present value figure of $83,255. R. Supp. Vol. X at 1189-204. Fitzgerald used a five-year term but stated that three years would have been a more accurate period. *Id.*

at 1204. Therefore, if the jury followed Fitzgerald's testimony, it could have awarded damages in the neighborhood of $55,000 to $83,255. The actual award was $21,423.00.

We have stated that "[a] motion for new trial on the grounds that the jury verdict is against the weight of the evidence normally involves a review of the facts presented at trial, and thus involves the discretion of the court." *Black v. Hieb's Enter., Inc.*, 805 F.2d 360, 363 (10th Cir. 1986). Our review focuses on whether the verdict is clearly, decidedly, or overwhelmingly against the weight of the evidence, with the trial court's decision to stand absent a showing of a manifest abuse of discretion. *Id.* "The amount of damages awarded by the jury can be supported by any competent evidence tending to sustain it, and '[o]ur appellate function is completed when we are convinced that an evidentiary basis in the record supports the jury's verdict.' " *Id.* (quoting *Bennett v. Longacre*, 774 F.2d 1024, 1028 (10th Cir. 1985)). *See also, Hudson v. Smith*, 618 F.2d 642, 646 (10th Cir. 1980) ("A jury's verdict regarding the amount of damages should be upheld unless it is clearly erroneous, or there is no evidence to support it.").

In its brief, CNA formally propounded only the argument that the verdict was against the weight of the evidence, but it also made statements to the effect that the verdict was "facially inadequate," which is a separate legal theory upon which to attack an award. A trial judge's determination of the adequacy of a jury award is also reviewed under the abuse of discretion standard. *Black*, 805 F.2d at 362. No abuse of discretion will be found "unless the verdict is so inadequate 'as to shock

the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption, or other improper cause invaded the trial.' " *Id.* (quoting *Bennett v. Longacre*, 774 F.2d 1024, 1028 (10th Cir. 1985)). "Absent such a showing of passion or prejudice, the jury's finding on damages is considered inviolate." *Black*, 805 F.2d at 362.

The damage figure awarded by the jury is not so inadequate as to raise an inference of passion or prejudice, and CNA has offered no objective evidence in support of such a finding. Under the standard in *Black*, the court cannot find that the award is so inadequate as to require a new trial. But after a study of the record, the court has reached the inescapable conclusion that the jury's damage award is clearly, decidedly and overwhelmingly against the weight of the evidence, such that the trial judge abused his discretion in not granting a new trial. In arriving at this result, the court has considered each argument made by Southwestern Bell in support of the award and has found uncontroverted evidence to the contrary in the record.

Southwestern Bell first argues that because the contracts in question were of one year's duration, the jury could have returned a damage estimate as low as $17,227. Dr. Fitzgerald, defendant's expert, noted that although the independent contractors canceled CNA policies of approximately $775,000 in premium value shortly after the release of the disparaging statements, CNA refunded only $287,000 in unused premiums. This was their actual loss in premium dollars on contracts then in existence. Fitzgerald assumed a six-percent profit figure and opined

that the loss in profits was $17,227 for those contracts. R. Supp. Vol. X at 1202.

An award of $17,227 would have necessarily assumed that none of the contractors (who among them held 467 policies consisting of worker's compensation, automobile, general liability, and OCP policies) would have remained insured with CNA even without having learned of Southwestern Bell's intent to blackball CNA-insured businesses. In other words, an award in the neighborhood of $17,000 would have to have assumed that each of the independent contractors would choose not to renew their CNA policies for reasons wholly unrelated to the Southwestern Bell letters. The uncontroverted testimony established that contractors stay with a particular insurance company for an indeterminate amount of time. Fitzgerald's own testimony was that a particular contractor may stay with a particular insurance company "for one year, probably two, and more likely three." *Id.* at 1198. Plaintiff's evidence showed that it had progressively captured more of the general contractor insurance market, going from one cable layer in 1977 to 114 in 1983. R. Supp. Vol. VIII at 710. No evidence was offered to indicate that the trend would not continue. We can find no basis for the first argument.

Defendant's second argument is that Fitzgerald's testimony supported a *maximum* award of $83,255, and five variables could have been employed by the jury to arrive at a much smaller figure. We will deal with these variables in turn:

(1) "not all of the contracts cancelled were necessarily cancelled as a result of any action by Southwestern Bell."

While the evidence does not establish the motivation of every independent contractor in canceling their CNA policies, plaintiff's exhibit 53 shows the following: Within one week of releasing the strong-arm letter, 105 policies were canceled; within two weeks, 288 policies; three weeks, 334 policies; one month, 357 policies; and two months, 393 policies. By 1984, CNA insured *no* cable layers. R. Supp. Vol. V at 167. Other testimony, including that of the independent insurance agents who dealt directly with the contractors, established that the majority, if not the totality, of cancellations were directly related to Southwestern Bell's actions. *E.g.*, R. Supp. Vol. V at 214, 221; R. Supp. Vol. VI at 403-13. Southwestern Bell offered no testimony concerning cancellations that were unrelated to its actions. Whatever number of cancellations might theoretically be attributed to causes other than the damaging statements, the record fails to support defendant's argument.

(2) "CNA's Oklahoma City branch, due to Oklahoma's poor economy, probably had a profit rate less than CNA's nationwide experience"

In arriving at the figure of $83,255, Fitzgerald assumed a profit rate of 6% arrived at by an average of CNA's national profit rates in 1982 (7%), 1983 (7%), and 1984 (4%). At the time of trial, in September 1985, CNA's profits were running at a rate of 15% for 1985 and had historically been in the 10% range, but this was not factored into the $83,255. Southwestern Bell contends that the jury could have used a rate as low as 3% in determining damages, but does not support the 3% figure from the record. The lowest estimate given the jury was the 6% offered by Fitzgerald. His testimony was that a 6% figure

is "fair." R. Supp. Vol. X at 1202. Furthermore, we cannot find in the record that Southwestern Bell ever submitted testimony comparing a profit rate in Oklahoma with CNA's nationwide performance or establishing any relationship whatsoever between the rate of profit and the economy. This second variable supports but a minimal fluctuation in the damage figure, if indeed it supports any at all.

(3) "because, as shown by its own internal records, CNA's Oklahoma City branch systematically mishandled claims, much of CNA's drop in business would be attributable to that circumstance"

This argument was addressed in (1) above. Southwestern Bell apparently presented no evidence supporting this as a reason for cancellations. The only evidence in the record establishes that most, if not all, loss in cable-layer insurance was directly related to Bell's conduct.

(4) "Bell employed fewer independent contractors in 1983"

The evidence does establish that Bell decreased its use of outside contractors for cable-laying operations, but several matters in the record diminish the weight of this fact. First, the type of policies *required* of independent cable-laying contractors by Southwestern Bell were the OCP and GL policies. Of the $775,000 in CNA's lost premiums from these contractors, only $13,500 was for OCP policies and $200,000 for GL policies. The evidence showed that an OCP was a relatively inexpensive insurance policy, with the main insurance business coming from the general liability, automobile, and worker's compensation policies purchased by the contractors. Therefore, a loss in cable-laying business precipitated by Bell's

decrease in demand certainly does not support a corresponding and proportionate loss in overall premium income. Second, the perhaps temporary decrease in demand by Bell for independent cable-laying contractors could have very little impact on the actual purchase of insurance, for this reason. Bell informed the independent contractors that their *bids* would not even be accepted if their insurance carrier was CNA. Thus, at any one point in time, regardless of the condition of the market for cable-laying companies, the independent contractors will not carry CNA insurance for fear that if a cable-laying job opens up, they will not be qualified to participate in the bidding process. Defendant's fourth variable carries very little weight.

(5) "the contracts at issue were each for one year's duration"

This variable was dismissed above as without significance.

Viewing defendant's alleged potential variations as a whole, we are compelled to find that the overwhelming evidence requires a verdict much in excess of $21,423. While the record might permit some slight fluctuation from the $83,255 figure, the actual award is grossly at odds with the evidence. Of particular importance is defense expert's calculation of $17,227 as the damages merely for the undisputed loss of the initial partial year of premiums. This figure taken alone assumes continuation of *none* of the 114 cable-laying companies carrying 467 policies with CNA. Considering that CNA was steadily increasing its share of this market and that many contractors carry a particular insurance company for three or more years, the addition of barely $4,000 for *all*

future losses arising from the cancellations precipitated by Southwestern Bell is decidedly against the weight of the evidence. The district court abused its discretion in denying CNA's motion for new trial on the issue of damages.*

III.

The second claim of error is based on the district court's determination that Southwestern Bell's statements were not libel per se. Immediately before the trial began, the district court ruled from the bench that the alleged defamatory statements were not libel per se. The court memorialized its ruling without explanation in an order dated October 18, 1985. Because the issue of whether a statement is libelous per se is one of law for the court, *Akins v. Altus Newspapers, Inc.*, 609 P.2d 1263, 1267 (Okla.), *cert. denied*, 449 U.S. 1010 (1980), our review of the district judge's order is de novo.

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*Southwestern Bell argues that CNA waived its objection by failing to contest the district court's response to a note from the jury. During its deliberations, the jury submitted this question to the court: "Instruction 15, Paragraph 3 says ' . . . so long as a reasonable basis for such estimate or approximation is shown with reasonable certainty.' Should we document any method we use to determine any dollar amounts?" The parties and the court agreed upon the following response: "In response to your first question, you are advised that the jury is not required to document the method by which any such dollar amounts are determined." We believe that the court's answer to the jury was the correct one and find no waiver on this basis.

In Oklahoma, actions for libel are statutorily defined. The statute reads as follows:

> Libel is a false or malicious unprivileged publication by writing . . . which exposes any person to public hatred, contempt, ridicule or obloquy, or which tends to deprive him of public confidence, or to injure him in his occupation. . . .

Okla. Stat. tit. 12, § 1441 (1986). Statements alleged to be libelous fall into three categories under Oklahoma law: (1) those not of defamatory meaning; (2) those reasonably susceptible of both a defamatory and an innocent meaning (known as libel per quod); and (3) those clearly defamatory on their face (libel per se). *Sellers v. Oklahoma Publishing Co.*, 687 P.2d 116, 119-20 (Okla. 1984). The Oklahoma Supreme Court recently examined the concept of libel per se in the context of a plaintiff business:

> "In order that words shall be libelous per se as disparaging a person in his trade or business, they must have been spoken of plaintiff in relation thereto, and be of such a character as would prejudice him by impeaching either his skill or knowledge, or attacking his conduct in such business."

McCullough v. Cities Serv. Co., 676 P.2d 833, 834 (Okla. 1984) (quoting *Kee v. Armstrong, Byrd & Co.*, 75 Okla. 84, 182 P. 494 (1919)).

The question facing us is whether a false statement to the effect that an insurance company has, on numerous occasions, denied valid claims attacks the company's conduct of its business. We find that it does. Such a statement undermines the very essence of the service that an insurance company provides. Businesses and individuals purchase insurance for the ultimate purpose that upon the occurrence of a valid claim, a loss will be covered by

the insurance company. Indeed, the court can think of no greater disparaging remark about an insurance company than an attack against its propensity to honor the insurance contract by paying valid claims. The "natural and probable effect on the mind of the average lay reader," *Sellers*, 687 P.2d at 120-21, is that CNA is an insurance company to be avoided. Indeed, the subsequent loss of *every* cable-laying contractor was the logical and intended result of the statement, and it bears witness to the fact that the libelous words "tend[ed] to lower plaintiff in the estimation of men whose standard of opinion the court can recognize." *Fite v. Oklahoma Publishing Co.*, 146 Okla. 150, 293 P. 1073, 1077 (1930). No other circumstances or facts are needed for the reader to understand the full import of the statement. Southwestern Bell's statement was clearly defamatory on its face, rendering it libel per se under Oklahoma law.

In its instructions from the bench, the district court stated that for CNA to recover on its libel claim, it must prove the following elements: "(1) The defendant made a written statement about the plaintiff; (2) That the [sic – the word "statement" was either mistakenly not transcribed or was omitted by the district judge] was false; (3) The statement was defamatory in nature; (4) That the statement was published to a third party; and (5) As a result of the statement, the plaintiff suffered specific and identifiable damages." R. Supp. Vol. X at 1361. We have previously noted that under Oklahoma law, "one who is liable for a per se libel or slander is liable for both general and special damages." *M.F. Patterson Dental Supply Co. v. Wadley*, 401 F.2d 167, 172 (10th Cir. 1968). *See also Akins v. Altus Newspapers, Inc.*, 609 P.2d 1263, 1267 & n.4 (Okla.)

(agreeing with *M.F. Patterson*), *cert. denied*, 449 U.S. 1010 (1980).

The procedural significance between libel per se and libel per quod is that if the defamation is actionable per se, the defendant can be liable without proof of special damages, *see* Restatement (Second) of Torts § 569 (1977), while an action for libel per quod "is dependent on allegation of special damages." *Sellers*, 687 P.2d at 121. Special damages are actual subjective losses, *i.e.*, out-of-pocket losses. They consist of damages that "must be proven by specific evidence as to the time, cause and amount." *M.F. Patterson*, 401 F.2d at 173. Alternatively, general damages encompass "more customary types of actual harm inflicted by defamatory falsehood," including "impairment of reputation and standing in the community." *Akins*, 609 P.2d at 1267. They are a form of compensatory damages imposed for the purpose of compensating the plaintiff for the harm that the defamation has caused to his reputation. There is a presumption of general damage to reputation from a defamatory publication that is actionable per se. Restatement (Second) of Torts § 621, comment a (1977); *see also Akins*, 609 P.2d at 1267 n.4. Because the district court in a the present case required the jury to find actual and specific out-of-pocket losses as an element of plaintiff's libel claim, R. Supp. Vol. X at 1364 (which in turn resulted from its finding that the statement was not libel per se), it prevented the jury from finding for plaintiff solely on the basis of general damages. This was reversible error, and plaintiff's motion for new trial on its libel claim must be sustained.

The court finds no merit in plaintiff's remaining allegations of error, including the district court's decision to permit Fitzgerald's testimony, to qualify Fitzgerald as an expert, to admit certain exhibits in support of Fitzgerald's testimony, and to admit certain evidence in support of Southwestern Bell's defense of truth. The orders of the district court on these matters shall be affirmed.

IV.

In summary, concerning plaintiff's tortious interference with contract claim, we conclude that the trial court abused its discretion in denying the motion for new trial on the issue of damages, based on our finding that the jury's award of damages was against the weight of the evidence. We also conclude that the trial court committed reversible error in denying the motion for new trial on plaintiff's libel claim, based on our finding that statements published by Southwestern Bell to third persons were libelous per se under Oklahoma law. Finally, we conclude that the trial court did not commit error in its admission of testimony and exhibits at trial.

We therefore set aside the jury's verdict on (1) the damages that resulted from Southwestern Bell's tortious interference with contract and (2) the libel claim, and remand to the district court for a new trial on these issues. We affirm in all other respects.

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED.

October 18, 1988

Before Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha, Honorable Bobby R. Baldock, Honorable Wade Brorby, Honorable David M. Ebel, Circuit Judges, and Honorable Dale E. Saffels, District Judge.

CONTINENTAL CASUALTY COMPANY,	)	
Plaintiff-Appellant,	)	
vs.	)	No. 86-1281
SOUTHWESTERN BELL TELEPHONE COMPANY,	)	
Defendant-Appellee.	)	

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Judge Holloway did not participate in consideration of the petition.

/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk

(2)

No. 88-1193

Supreme Court, U.S.
FILED
FEB 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

SOUTHWESTERN BELL TELEPHONE COMPANY,

Petitioner,

v.

CONTINENTAL CASUALTY COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

Southwestern Bell Telephone Company ("Bell") is the petitioner. Continental Casualty Company ("CNA") is the respondent.

CNA sued Bell for contractual interference. A jury returned a verdict for CNA that Bell had tortiously interfered with CNA's contracts and awarded damages to CNA. CNA moved for a new trial solely on the issue of damages. When this motion was denied, CNA appealed the damage award. Bell did not cross-appeal.

The Tenth Circuit found that the evidence did not support the damages awarded and reversed for a retrial on the damage issue only. In moving for a rehearing, Bell argued for the first time that Bell's liability for interfering with CNA's contracts should be retried. *"Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc"*, p. 9 (June 14, 1988).

When a rehearing was denied, Bell petitioned for certiorari asserting, for the first time, that a new trial on damages only was inconsistent with the Seventh Amendment to the U.S. Constitution.

REASONS FOR DENYING THE WRIT

A petition for writ of certiorari is granted "only when there are special and important reasons therefor". Sup. Ct. R. 17.1. *See also Rice v. Sioux City Memorial Park Cemetery*, 749 U.S. 70, 73-74, 75 S.Ct. 614, 99 L.Ed. 897 (1955). Bell has not posited any such "special and important" issue. The sole purported basis for seeking this writ is an

alleged conflict between the opinion below and the Seventh Amendment to the United States Constitution. Bell complains of two conflicts; neither is a "special and important" reason for reviewing the order below. Both arguments are premised on inaccurate or incomplete representations of the Tenth Circuit opinion and the law.

The first representation is that jury damage awards may only be disturbed if they shock the conscience of the appellate Court. *Petition for Writ of Certiorari*, p. 6. Bell contends the Tenth Circuit erred when it "weighed the evidence and reversed the trial judge on the ground that the verdict was against the weight of the evidence. (860 F.2d at 973)" *Petition for Writ of Certiorari*, p. 5. What the Tenth Circuit actually said was:

> But after study of the record, the Court has reached the inescapable conclusion that **the jury's damage award is clearly, decisively and overwhelmingly against the weight of the evidence**, such that **the trial judge abused his discretion in not granting a new trial**. At arriving at this result, the Court has considered each argument made by Southwestern Bell in support of the award and has found uncontroverted evidence to the contrary in the record.

Continental Casualty Co. v. Southwestern Bell Telephone Co., 860 F.2d 970, 973 (10th Cir. 1988) (emphasis added). In essence, the Tenth Circuit holding was based on a conclusion that the jury damage award was not supported by any evidence and the Trial Court abused its discretion in not granting a new trial on damages. In paraphrasing the Tenth Circuit, Bell omitted three adverbs ("clearly, decidedly and overwhelmingly") which imply much more than a mere weighing of the evidence.

Bell's second representation is that the Seventh Amendment was violated when the Tenth Circuit Court of Appeals remanded the case for new trial on the issue of damages only. Awarding a new trial on the issue of damages only does not violate the Seventh Amendment right to a jury trial. Further, Bell did not appeal the jury verdict that Bell had liability for tortious interference with CNA's contracts nor even argue that the liability verdict should be reversed until moving for a rehearing before the Tenth Circuit.

Because Bell's representations cannot withstand scrutiny, its subsequent arguments are without merit.

PROPOSITION ONE: THE TENTH CIRCUIT OPINION IS CONSISTENT WITH THE SEVENTH AMENDMENT.

Bell contends its Seventh Amendment right to a jury trial was violated when the Tenth Circuit reversed the jury award of damages without a finding that the award shocked "the conscience of the Court". *Petition for Writ of Certiorari*, p. 6. Bell argues that the Tenth Circuit opinion is inconsistent with the decisions of other circuit courts because the appeals court reversed the jury damage award without stating that it was shocked by the award.

Bell has simply erected a strawman (that reversal of a damage award *must* be based on a "shocked conscience") which it then proceeds to topple. Bell's own case citations undercut its false premise. *See e.g. Joan W. v. City of Chicago*, 771 F.2d 1020, 1023 (7th Cir. 1985) ("trial judges may vacate a jury verdict for excessiveness only if it is

'monstrously excessive' **or if there is 'no rational connection between the evidence on damages and the verdict' ").**[1] (emphasis added).

The Seventh Amendment provides that "no fact tried by a jury, shall be otherwise re-examined in any court of the United States, **than according to the rules of the common law.**" (emphasis added). At common law, a judge has the power "to set aside" a jury "verdict if in his opinion it is against the law or the evidence". *Capitol Traction Co. v. Hof*, 174 U.S. 1, 14, 19 S.Ct. 580, 585 (1899). Further, it has long been understood that if a trial judge is not satisfied with a jury verdict, he has the right – and indeed the duty – to set aside the verdict and order a new trial. *Aetna Cas. & Sur. Co. v. Yeatts*, 122 F.2d 350, 352-354 (4th Cir. 1941); *see also Tidewater Oil Co. v. Waller*, 302 F.2d 638, 643 (10th Cir. Okl. 1962).

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[1] *See also Vidrine v. Kansas City Southern Ry. Co.*, 466 F.2d 1217, 1226 (5th Cir. 1972) ("When the amounts of the awards are considered in connection with the other evidence of illegality of the verdicts, we think that . . . the awards . . . was [sic] so grossly inadequate as to amount to legal error"); *Brown v. Freedman Baking Co.*, 810 F.2d 6, 12 (1st Cir. 1987) ("we will uphold it [jury verdict]" **"unless** the facts and inferences, when viewed in the light most favorable to the party to whom the jury held, points so strongly and overwhelmingly in favor of the movant that a reasonable jury could not have arrived at this conclusion") (emphasis added); *C.A. May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049, 1053 (5th Cir.), *cert. denied* 454 U.S. 1125 (1981) ("it is within the discretion of the trial judge to grant a new trial where the jury verdict is inadequate. A refusal to do is subject to reversal for abuse of discretion only **where the jury's verdict is without factual support in the record**") (emphasis added).

A finding that the damages awarded were "facially inadequate" "is a separate legal theory" from an "argument that the verdict was against the evidence". *Continental Casualty, supra* p. 973, *citing Black v. Hieb's Enterprises, Inc.*, 805 F.2d 360 (10th Cir. 1986). The "shocked conscience" test applies to a reversal based on the "facial inadequacy" theory, not to a reversal premised on a "clearly erroneous" damage award or one unsupported by the evidence. *Cf. Hudson v. Smith*, 618 F.2d 642, 646 (10th Cir. Okl. 1980). Here, the Panel did not find the damages to be so "inadequate" as to "shock" its conscience. *Continental Casualty, supra* p. 973. Rather, the damage award was reversed because the verdict was unsupported by the evidence. A new trial can be granted if a jury verdict is "against the weight of the evidence". *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525, 540, 78 S.Ct. 893, *reh. denied* 357 U.S. 933, 78 S.Ct. 1366 (1958); *United States v. Hess*, 341 F.2d 444, 448 (10th Cir. 1965) ("Insufficiency of the evidence is one of the common law grounds for . . . granting a motion for a new trial.").

As set out in *Black, supra* p. 363, a "trial court's decision to deny a motion for a new trial will stand absent a showing of a manifest abuse of discretion." The standard for finding such a manifest abuse is "whether the verdict is clearly, decidedly or overwhelmingly against the weight of evidence". *Id.* In reversing the jury damage award, the Tenth Circuit stated "the jury's damage award is clearly, decidedly and overwhelmingly against the weight of evidence, such that **the trial judge abused his discretion in not granting a new trial**." *Continental Casualty, supra* p. 973 (emphasis added). The

damage verdict reversal is essentially based on a *total lack of evidence* to support the amount awarded. *Continental Casualty, supra* pp. 973-975. Whether the verdict is supported by the evidence is a threshold appellate question. *See e.g. Black, supra* p. 363; *Bennett v. Longacre,* 774 F.2d 1024, 1028 (10th Cir. Okl. 1985). In answering this elementary appellate question, the Panel Opinion determined that *no* evidence in the record tended to sustain the amount of the jury damage verdict. *Continental Casualty, supra* pp. 973, 975.

In reviewing the evidence to ensure that the record supported the verdict, the Tenth Circuit came to the well-reasoned and indisputable conclusion that the evidentiary record did not support the jury damage award. The Tenth Circuit's conclusion and ruling are entirely consistent with the Seventh Amendment to the U.S. Constitution and accepted case law in the Tenth Circuit and all other circuits.

PROPOSITION TWO: BELL'S LIABILITY TO CNA FOR TORTIOUS CONTRACTUAL INTERFERENCE IS NOT AN APPELLATE ISSUE.

In seeking a reversal of the jury verdict that Bell tortiously interfered with CNA's contracts, Bell is asking this Court to consider an issue not raised on appeal. Bell filed no cross-appeal on the issue of liability nor argued in its brief to the Tenth Circuit that liability was so intertwined with damages that a reversal of the latter would necessarily mandate reversal of the former. The circuit courts of appeal treat those issues which the parties have not preserved for appeal as waived. *Watts v.*

United States, 220 F.2d 483, 485 (10th Cir. 1955), *cert. denied* 349 U.S. 939 (1955) ("There is a plethora of authority holding that a point not briefed or argued may be treated as waived"); *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185, 191 (1937) ("In the absence of a cross-appeal" a party may not " 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.' . . . The rule is inveterate and certain.") cited in *Dawson v. Andrus*, 612 F.2d 1280, 1282 fn. 3 (10th Cir. 1980). No party to this suit has ever appealed or claimed as error the jury verdict that Bell was liable to CNA for contractual interference. In fact, Bell argued that "the judgment of the jury in this action should be affirmed." (brief of appellee, p. 50, 7-22-86).

Bell simply cannot assert – for the first time in a petition for rehearing of an appellate opinion – that the jury verdict for respondent should be reversed. *See Carr v. F.T.C.*, 302 F.2d 688 (1st Cir. 1962) (in denying a petition for rehearing, the First Circuit said: "This is not a case of a party caught in some manner by surprise. It is not even the case of indifferent counsel not versed in every branch of the law. . . . For a [party] . . . best familiar with his own practice with respect to a matter directly in issue, and now said to be of paramount importance, to make no mention of the subject until after he had lost the case on other grounds, if deliberate, is a breach of duty to the Court and, if inadvertent, is still inexcusable." *Id.* at 692.)

Even if Bell had timely urged error in the jury verdict for CNA, Bell would not be entitled to a reversal. As

stated by the Tenth Circuit, the evidence at trial was uncontroverted that Bell's tortious contractual interference caused CNA to lose insurance contracts with 143 cablelayers resulting in annual premium losses of more than $776,000.00.

> Southwestern Bell offered no testimony concerning cancellations that were unrelated to its actions. Whatever number of cancellations might theoretically be attributed to causes other than the damaging statements, the record fails to support defendant's argument.

Continental Casualty, supra p. 974. A retrial on the issue of damages only does not infringe on the Seventh Amendment right to a jury trial "unless the separate retrial on damages are so interwoven with the issues of liability already tried that it is unjust to try the damages separately". *See e.g. Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802 (3rd Cir. 1984) *cert. denied* 477 U.S. 908 (1986).

Finally, Bell argues that the Tenth Circuit erred when it "ordered a new trial limited to damages without even considering the possibility that the amount of damage award reflected a compromise verdict". (*Petition, supra* p. 12) and thus the Panel Opinion conflicts with *National R.R. Passenger Corp. v. Koch Industries, Inc.*, 701 F.2d 108 (10th Cir. Okl. 1983). This is a unique case which does not support Bell's argument.

> We would uphold an order of a new trial on damages **unless** the record clearly demonstrated a compromised judgment. [citations omitted]

Id. at 111 (emphasis added). In *National R.R. Passenger Corp.*, when both parties moved for a new trial, a magistrate sitting as a Special Master concluded that the jury had reached a compromise verdict and recommended a new trial on all issues. The trial court refused to accept the magistrate's recommendation and, consistent with plaintiff's motion, granted a new trial on damages only. On remand, the trial court was directed *to reconsider* its denial of defendant's motion for a new trial on both liability and damage issues because "before the district judge may reject the master's recommendation of a new trial on all issues he must review the transcript." *Id.* at 111. None of these special facts are present in this appeal. Here, the Panel Opinion was decided after a thorough review of all the trial transcripts.

Appellate courts clearly have the power to reverse a jury verdict for a retrial of the damage issue only. Fed. R. Civ. P. 59(a); *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 515, 51 S.Ct. 513, 515 (1931). As the Tenth Circuit found, Bell established no relationship between liability and damages. Liability and damages were separate issues. The jury was instructed "not [to] consider the question of whether the plaintiff has been damaged until you have first considered and decided the question of whether or not the defendant is liable". TR 1369. "With regard to the plaintiff's claim of intentional interference with contract rights" the jury finds "in favor of the plaintiff, Continental Casualty Company, and against defendant, Southwestern Bell . . . " TR 1383; *see also* (doc. 313, verdict, p. 1, 9-30-85).

> The jury's verdict was in two parts. The first was a finding in 'favor of the plaintiff and against the

> defendant.' The second was an award of 'general, special and compensatory damages.' Inherent in part 1 is a finding that the company was negligent. **There is no reason for relitigation of that question.**

Trejo v. Denver & R.G.R. Co., 568 F.2d 181, 184 (10th Cir. 1977) (emphasis added). Accordingly, the Panel Opinion does not threaten the uniformity of decisions issued among the circuits nor decide a question of exceptional importance.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

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